

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-660**

THE HUMANE SOCIETY OF THE UNITED STATES, NEW JERSEY BRANCH, INC., a nonprofit corporation of the State of New Jersey; THE SIERRA CLUB, INC., a California nonprofit corporation; HERMINA C. M. ANDREWS and FRED FERBER, citizens and taxpayers of the State of New Jersey,

*Appellants,*

v.

NEW JERSEY STATE FISH AND GAME COUNCIL, an agency of the State of New Jersey; WILLIAM T. CAHILL, Governor of the State of New Jersey; THE SENATE OF THE STATE OF NEW JERSEY and ALFRED N. BEADLESTON, President thereof; THE NEW JERSEY STATE FEDERATION OF SPORTSMEN'S CLUBS, a nonprofit association of the State of New Jersey, and ROBERT SMALLEY, President thereof; and the STATE OF NEW JERSEY, acting through the AGRICULTURAL CONVENTION OF THE STATE OF NEW JERSEY, a public body organized under the Revised Statutes of New Jersey,

*Appellees.*

**On Appeal from the Supreme Court of New Jersey**

**MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF**

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SENATE OF THE STATE OF NEW JERSEY and  
ALFRED N. BEADLESTON, President thereof; THE  
NEW JERSEY STATE FEDERATION OF SPORTS-  
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**MOTION TO DISMISS AND BRIEF IN SUPPORT  
THEREOF**



### **Motion to Dismiss**

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, New Jersey State Fish and Game Council, the Governor of New Jersey, the New Jersey State Senate, the Senate President and the Agricultural Convention of the State of New Jersey, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

### **Question Presented**

Does the Equal Protection Clause of the Fourteenth Amendment prohibit a state from limiting membership on the state agency responsible for promoting and regulating hunting and fishing to individuals who are sportsmen, farmers or fishermen?

### **Counter-Statement of the Case**

The New Jersey Fish and Game Council, a governmental agency within the Division of Fish, Game and Shellfisheries in the Department of Environmental Protection (N.J.S.A. 13:1D-4), is a special purpose unit of government comprised of eleven members with limited statutory powers over the propagation and recreational use of New Jersey's fresh water fish, game birds and game and fur-bearing animals. The Council is empowered to establish a State Fish and Game Code regulating "... under what circumstances, when and in what localities, by what means and in what amounts and numbers such fresh water fish, game birds, game animals, and fur-bearing animals, or any of them, may be pursued, taken, killed, or had in

possession. . . ." N.J.S.A. 13:1B-30. The regulatory control of the Council is limited to that portion of the State's wildlife that has by statute and common usage been the subject of hunting and fresh water fishing. For example, N.J.S.A. 13:1B-30 limits the Fish and Game Code to "game birds", which are defined by N.J.S.A. 23:4-49 to include only some 21 species of the many birds found in New Jersey. Another statute, N.J.S.A. 23:4-1, further restricts the Council's power over even game birds by prohibiting hunting for all but six of the 21 game bird species unless the United States Department of Interior has prescribed an open season and set bag limits. Similarly, N.J.S.A. 13:1B-30 limits the regulatory power of the Council to "game animals" and "fur-bearing animals". See also, N.J.S.A. 23:3-1; N.J.S.A. 23:4-1; and N.J.S.A. 23:4-42.

In furtherance of these hunting and fishing responsibilities, the Council has been given charge over the conduct and control of State owned hatching stations and game farms. N.J.S.A. 23:2-2; N.J.S.A. 23:8-1. It also has been authorized to "stock with fish, birds and game only such lands and waters" as are open to anglers and hunters (N.J.S.A. 23:2-3) and to lease game refuge land, N.J.S.A. 23:8-7. Furthermore, the Council has the power to regulate animals that menace agricultural crops. N.J.S.A. 23:4-63.3.

Membership on the special purpose Council is obtained, for nine of its eleven members, through a three tiered process. The statute challenged by appellants, N.J.S.A. 13:1B-24, provides that:

"There shall be within the Division of Fish and Game, a Fish and Game Council which shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge of an interest in the conservation of fish and game. Each member

of the council shall be appointed by the Governor, with the advice and consent of the Senate. Three of such members shall be farmers, recommended to the Governor for appointment to the council by the agricultural convention held pursuant to the provisions of article two of chapter one of Title 4 of the Revised Statutes; six of such members shall be sportsmen, recommended to the Governor for appointment to the council by the New Jersey State Federation of Sportsmen's Clubs; and two of such members shall be commercial fishermen."

Thus, the three farmer members are first recommended to the Governor by the State Agricultural Convention, then nominated by the Governor, if he accepts the recommendations, and finally appointed with the advice and consent of the Senate. The process for selecting the six sportsmen members is similar, differing only in that recommendations are made by the New Jersey State Federation of Sportsmen's Clubs. N.J.S.A. 13:1B-24 does not require the sportsmen or farmers so recommended to be a member of any sportsmen club or agricultural association. The two commercial fishermen members are simply nominated by the Governor and appointed with the advice and consent of the Senate without a recommendation by any group.

The Supreme Court of New Jersey, in upholding the constitutionality of the statutory method of appointment of members of the Council, expressly found that the Council is a "specialized body" and that its members do not have "plenary powers" (App. A at 9-10). The Court also noted that the Council's authority has been circumscribed by various administrative and judicial controls. It therefore concluded that "[t]he consignment of the specialized

powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis, because these entities are most directly affected by the Council's regulations and possess the requisite expertise for achievement of the statutory objective" (App. A at 15-16).

## ARGUMENT

**The appellants have not presented a substantial constitutional question entitling them to appeal as of right, because the limitation of membership on the New Jersey Fish and Game Council to sportsmen, farmers and fishermen is rationally related to the limited statutory functions of that agency and therefore is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.**

The law has always recognized that office holding is not an unfettered, fundamental right. *Snowden v. Hughes*, 321 U.S. 1 (1943). Rather, a state has broad freedom in deciding on eligibility for a particular office, and it may impose such requirements for appointment as are reasonable in light of the legislatively created specialized demands of the office. The one constraint imposed by the Equal Protection Clause on the criteria of eligibility for public office selected by a state is that a challenged classification may not rest "... on grounds wholly irrelevant to the achievement of a valid state objective." *Turner v. Fouche*, 396 U.S. 346, 362 (1970). Cf. *Salzer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, 410 U.S. 719 (1973).



There is no substantial basis for the appellants' claim that the criteria of eligibility for appointment to the New Jersey Fish and Game Council are wholly irrelevant to any valid state objective. The qualifications in question, that members of the Council must be farmers, sportsmen and commercial fishermen, flow from the specialized powers and duties of the office and are rationally designed to insure the selection of qualified individuals who are philosophically attuned to the legislative purpose in creating the Council and vesting it with its limited and unique functions. The Council's basic duty is to regulate the hunting and fishing of game birds as defined by N.J.S.A. 23:4-49, game animals, fur-bearing animals, and fresh water fish, and to conserve, propagate and maintain an adequate supply of such game for the public's use through recreational hunting and fishing and as a food supply. N.J.S.A. 13:1B-30. This authority is circumscribed by the statutory setting of hunting seasons and bag limits for most species. N.J.S.A. 23:4-1, *et seq.*; N.J.S.A. 23:4-39; N.J.S.A. 23:4-58.1; N.J.S.A. 23:5-1, *et seq.* Other powers of the Council, as previously set forth, relate to the propagation of game through control over hatching stations and game farms, control over the stocking of land and water with game species, and control over animals that menace agricultural crops. In short, the Fish and Game Council deals only with hunting and fishing and related activities as well as with protection of agricultural crops, and then only within narrow statutorily defined tolerances.\*

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\* The Council does not have any authority to decide that hunting or fishing will take place on any privately or State owned land. Private land may not be hunted on against the owner's wishes,

*(Footnote continued on following page)*

Therefore, it can readily be seen that the selection of sportsmen was a rational choice. Sportsmen, the hunters and fishermen of the State, have the keenest interest in insuring the bountiful supply of game birds and game animals and fresh water fish. There is no other group which could be counted on to be as devoted to the proper operation of the State's hatching stations and game farms and to see that the State's stocking activities were carried out in the most effective manner. Sportsmen are also self-motivated to develop regulations insuring safety in hunting. Therefore, there is no other group that is by experience and motivation as well suited to produce qualified members to exercise the Council's authority and duties over hunting and fishing and related activities.

Similarly, the selection of farmers for inclusion on the Council was a rational decision. Farmers are by experience and training the most knowledgeable group in our society on the interaction of wildlife and agricultural activities. A farmer's insight into the sometimes vexious problem of maintaining a maximum game population in harmony with bountiful crop production is a tremendous benefit to the Council in carrying out its functions. Hunting, breeding and stocking decisions all must take into

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*(Footnote continued from preceding page)*

N.J.S.A. 23:7-1, and decisions as to the competitive merits of hiking, canoeing or camping as opposed to hunting or fishing (assuming for argument sake that the activities conflict) are vested in other agencies of the State such as the Division of Parks and Forestry. See *e.g.*, N.J.S.A. 13:1B-15.101 and 104. The power of the Council in N.J.S.A. 13:1B-30 to set territorial hunting or fishing limits is simply in aid of its duty to insure an abundant supply of game and not a grant of authority to mandate such activity on any particular tract of land against the wishes of the owner.

account their impact on this extremely important segment of the State's economy. Also, the Council's authority over animals that menace agricultural crops can be more wisely exercised with the input of the three farmer members.

Finally, the selection of commercial fishermen to serve on the Council was a rational decision because of the knowledge and experience they can bring to the decision making process regarding fishing, fish propagation and stocking. Clearly, commercial fishermen, dependent as they are on the abundant supply of salt water species for their very livelihood, can be counted on to be motivated towards sound decision making over the fresh water fishing activities controlled by the Council.

The experience, training, motivation and specialized knowledge of the three groups amply supports the deliberate decision of the Legislature that they are appropriate ones to insure the propagation, proper management, and safe hunting and fishing of the game species of wildlife in this State.

These criteria of eligibility for appointment also insure that the personnel who will be appointed to the Council are sympathetic to the legislatively ordained purposes of that body. The basic grant of power to the Fish and Game Council, N.J.S.A. 13:1B-30, expresses the Legislature's intent to regulate hunting and fishing in a manner that will conserve and maintain an adequate and proper supply of the game birds, game animals, fur-bearing animals and fresh water fish of the State for the public's use through recreational hunting and fishing and as a food supply. The Legislature quite clearly chose to regulate the game species of wildlife in this State with hunting and fishing actively in mind, and also quite clearly set the criteria for appointment to the Council so as

to orient the Council's membership towards that legislatively decreed policy. Although the Legislature could have set forth its policy towards hunting and fishing in an even more detailed manner than it already has, thereby obviating the need for a Council, or vested the functions performed by the Council in the Division of Fish, Game and Shellfisheries to be carried out by an anonymous staff, it did not do so. Instead, the Legislature chose the present highly visible method of regulation by a group of farmers, sportsmen, and commercial fishermen. In so doing, the Legislature has acted in a rational and traditional fashion to further a perfectly legitimate policy decision. Therefore, the appellants' equal protection challenge to the New Jersey statutory plan is clearly lacking in substance.

The appellants' attack upon the provision that six members of the Council be recommended to the Governor by the Sportsmen Federation and three by the State Agricultural Convention is also lacking in substance. The Sportsmen Federation, which every sportsmen's club in the State with 25 or more members is eligible to join (N.J.S.A. 13:1B-25), is particularly well suited to recommend sportsmen who are best equipped by experience and knowledge to regulate the subject of fish and game. Similarly, the State Agricultural Convention, which represents a broad cross section of county agricultural boards and private agricultural groups, is ideally suited to select farmers who have the greatest familiarity with the impact of hunting upon agricultural pursuits. There is, therefore, nothing irrational about the legislative decision to provide that nominations of sportsmen to the Council shall be by recommendation of the Sportsmen's Federation and nominations of farmers by recommendation of the Agricultural Convention. It also should be



clearly noted that the challenged power is solely one to recommend. If the person recommended is unsatisfactory, he always can be rejected by the Governor or the Legislature. This recommending process is also fully consistent with the systems of appointment employed with respect to various state agencies in New Jersey and elsewhere, the constitutionality of which have been consistently upheld. *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A. 2d 881 (S. Ct. 1938), *aff'd per curiam*, 122 N.J.L. 414 (E. & A. 1939); *Seidenberg v. Bd. of Medical Examiners*, 80 N.M. 135, 452 P.2d 469 (Sup. Ct. 1969); *Lanza v. Wagner*, 11 N.Y. 2d 317, 183 N.E.2d 670 (Ct. App. 1962), *app. dismissed for lack of substantial fed. question*, 371 U.S. 74, *cert. den.*, 371 U.S. 901 (1962); *Floyd v. Thornton*, 220 S.C. 414, 68 S.E.2d 334 (Sup. Ct. 1954); *Elrod v. Willis*, 3055 Ky. 224, 203 S.W.2d 18 (1947); *Annotations*, 42 Am. Jur. 953; 97 A.L.R. 2d 363. *Note*, 32 Col. L. Rev. 80 (1932).

This Court too has previously recognized that the specialized responsibilities of a public agency may furnish a rational basis for special provisions for appointment or election thereto. In *Salzer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, *supra*, the Court rejected a challenge on equal protection grounds to a statutory scheme under which the directors of water storage districts, with comprehensive authority over regional water supply and flood projects, were elected solely by landowners whose votes were weighed in accordance with the extent of their land holdings. The Court held that the "special limited purpose" of a water storage district and "the disproportionate effect of its activities on landowners as a group" provided a rational basis for thus limiting the franchise in electing its directors.

The special provisions for appointment to the Council are even more clearly grounded in the specialized de-

mands of the office. Since the Council is an appointive administrative body whose responsibilities are limited to promoting and regulating hunting and fishing, its authority is specialized and limited. Furthermore, since the Council's discretionary powers are limited by the enabling legislation under which it operates, the authority of the Council, even within its limited sphere, is carefully circumscribed by the enactments of a democratically elected state legislature.

The appellants' attempt to ascribe a broader range of responsibilities to the Council are not supported by the record which was before the state courts or the statutes on which they rely. Thus, while the members of the Council do possess statutory law enforcement powers by virtue of their offices, the actual enforcement of the fish and game is primarily carried out by full time paid conservation officers who must be selected on the basis of merit and fitness as a part of the State's classified civil service. N.J.S.A. 23:2-4. Furthermore, the staff of the agency, including its law enforcement personnel, are not subject to the direction of the Council, as implied by the appellants, but rather are subject to the supervision of the Director of the Division of Fish and Game, whose appointment must be approved by the Governor. N.J.S.A. 13:1B-27. Furthermore, while Council does exercise some power over the Director, he is also subject to the immediate supervision and direction of the Commissioner of Environmental Protection (N.J.S.A. 13:1B-27, N.J.S.A. 13:1D-4), a cabinet level official appointed by the Governor with the advice and consent of the Senate. N.J.S.A. 13:1D-1. See also N.J.S.A. 13:1A-14. Finally, the Council has no authority whatever over the areas of wildlife management of greatest concern to the public generally, such as the protection of endangered species (N.J.S.A. 23:2A-1), and the only general authority it has over wildlife

planning and management is subject to the approval of the Commissioner of Environmental Protection. N.J.S.A. 13:1B-28. Therefore, it is plain that the appellants, apparently to avoid the controlling force of *Sayler Land Co. v. Tulare Lake Basin Water Stor. Dist.*, *supra*, paint an exaggerated picture of the powers of the Council.

In short, the Legislature has the constitutional right to establish rational criteria for appointive office holding, and its decisions with respect thereto should not be overturned unless they are patently arbitrary. At present the New Jersey Legislature, acting in democratic fashion and in furtherance of what must be conceded to be the sentiments of the majority of New Jersey citizens, has placed the responsibility for the regulation of hunting and fishing in the hands of sportsmen, farmers, and fishermen. Since there are cogent reasons for this legislative determination, it presents no substantial constitutional question under either the Equal Protection or Due Process clauses of the Fourteenth Amendment.

## CONCLUSION

**It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.**

Respectfully submitted,

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Fish and Game Council; Governor  
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